

BRAD D. BRIAN - CA Bar No. 079001
Brad.Brian@mto.com
LUIS LI - CA Bar No. 156081
Luis.Li@mto.com
TRUC T. DO - CA Bar No. 191845
Truc.Do@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100

THOMAS K. KELLY - AZ Bar No. 012025
tskelly@kellydefense.com
425 E. Gurley
Prescott, Arizona 85301
Telephone: (928) 445-5484

Attorneys for Defendant JAMES ARTHUR RAY

SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

State of Arizona,

Plaintiff,

vs.

James Arthur Ray,

Defendant.

CASE NO. V1300CR201080049

**DEFENDANT'S MOTION IN LIMINE
RE:**

**PRECLUSION OF LAY WITNESS
OPINION ON ULTIMATE ISSUE**

During witness interviews conducted by attorneys and investigating officials, some witnesses made statements regarding the ultimate issue in this case - the guilt or innocence of Mr. Ray as to charges alleged in the indictment. Opinion testimony concerning a defendant's guilt or innocence is not admissible under Arizona law. This Court must prohibit the State from offering testimony from any witness to the effect that they believe James Ray is guilty of the any or all of the alleged offenses. This request is supported by the following Memorandum of Points and Authorities.

2010 DEC 27 PM 4:05
JEANNE M. GARCIA, CLERK
BY: BOBBI JO BALL ✓

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Counsel anticipates that, as during pretrial disclosure and discovery, whether
4 elicited or not, testimony from various witnesses be that they believe Mr. Ray is guilty.
5 Specifically, counsel has concerns relating to possible opinion testimony regarding whether Mr.
6 Ray was reckless or negligent and responsible for causing the deaths of the victims. Opinion
7 testimony concerning guilt or innocence, whether offered by a lay witness or an expert, is
8 prohibited by the Arizona Rules of Evidence.
9

10 II. ARGUMENT

11 Testimony that tends to establish a witness's opinion concerning a defendant's guilt,
12 innocence or credibility is generally inadmissible. *State v. Williams*, 133 Ariz. 220, 228, 650 P.2d
13 1202 (1982). Although Rule 704 permits witnesses to offer opinions on ultimate issues, the
14 comment to that rule expressly excludes opinions concerning how the jury should decide the
15 case:

16 Some opinions on ultimate issues will be rejected as failing to meet the requirement
17 that they assist the trier of fact to understand the evidence or to determine a fact in
18 issue. *Witnesses are not permitted as experts on how juries should decide cases.*

19 Rule 704, Ariz. R. Evid., comment (emphasis added). *See Patterson v. State*, 591 S.W.2d 356,
20 362 (Ark. 1980) (Rule 704 permits opinion testimony only if it is "otherwise admissible;"
21 testimony about defendant's guilt "is not admissible for any reason" and its admission would
22 constitute error).

23 In *Williams*, the Arizona Supreme Court held that testimony regarding a
24 defendant's guilt is usually irrelevant and inadmissible under Rules 704 and 701. Rule 701
25 requires that lay witness opinion testimony be (1) based on the witness's perception and (2) that
26 it assists the trier of fact in deciding issues at trial. 133 Ariz. at 228.
27

28 Allowing evidence regarding the ultimate question of the defendant's guilt or

1 innocence amounts to error per se and requires reversal. *Bennett v. State*, 794 P.2d 879, 882 (Wyo.
2 1990). See, *State v. Lindsey, infra*. In *Bennett*, an investigator testified that the defendant was a
3 drug dealer and the source of cocaine purchased by the investigating officers. The court found the
4 investigator's testimony went beyond summarizing his findings to the ultimate conclusion that the
5 defendant was guilty, such a determination is solely for the jury, not a witness, to make. *Id.* at
6 882. The court held that this "critical" invasion of the jury's function amounted to error per se.

8 Even expert witnesses cannot offer opinion testimony concerning the guilt or
9 innocence of the defendant. In *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73 (1986), a
10 psychologist testified about the credibility of the victim's testimony that the defendant had
11 sexually abused her. The psychologist testified that (1) incest victims seldom lie and (2) the
12 victim's conduct was consistent with that of a person "who had been sexually abused by living at
13 home with her father." 149 Ariz. at 475. The Supreme Court found it erroneous to admit either
14 statement. Although expert testimony is sometimes admissible to explain behavioral
15 characteristics which might affect a witness's credibility, the expert cannot testify concerning the
16 accuracy or credibility of a particular witness nor give opinion testimony regarding the defendant's
17 guilt or innocence:
18

19 The law does not permit expert testimony on how the jury should decide the case. . .
20 . It is not the expert's function . . . to substitute himself or herself for the jury and
21 advise them with regard to the ultimate disposition of the case.

22 Thus, it would abdicate the jury's function to admit such evidence. See *Stephens v. State*,
23 774 P.2d 60, 64, 66 & 68 (Wyo. 1989) (allowing jurors to rely on a witness' opinion of the
24 defendant's guilt "would be the ultimate abdication of the function of the jury" and not the type
25 of assistance contemplated by evidentiary rules 702 and 704).
26
27
28

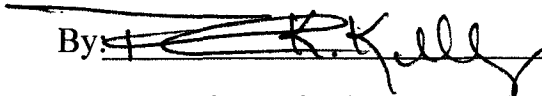
1 **III. CONCLUSION**

2 Evidentiary rules do not allow opinion testimony by either a lay or an expert witness
3 concerning the defendant's guilt or innocence. The admission of such evidence intrudes on the
4 jury's responsibility and would constitute reversible error. This Court should enter its orders
5 precluding admission of such evidence.
6
7
8

9 DATED: December 23, 2010

MUNGER, TOLLES & OLSON LLP
BRAD D. BRIAN
LUIS LI
TRUC T. DO

THOMAS K. KELLY

13 By: 
14
15 Attorneys for Defendant James Arthur Ray

16 COPY of the foregoing
17 mailed/faxed/delivered this
18 23rd day of December, 2010 to:

19 Honorable Warren R. Darrow
20 Pro Tem B
21 Yavapai County Superior Court
Verde Valley Judicial District
Camp Verde, AZ

22 Sheila Polk
23 Yavapai County Attorney
24 255 E. Gurley
Prescott, Arizona 86301

25 By: 
26
27
28